

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY MANN	:	CIVIL ACTION
	:	
v.	:	
	:	
ROBERT GILMORE, et al.	:	NO. 15-4591

ORDER

AND NOW, this 19th day of September, 2016, upon consideration of petitioner Gary Mann's petition for writ of habeas corpus (docket entry # 1), the Report and Recommendation ("R & R") from the Honorable Elizabeth T. Hey (docket entry # 15), petitioner's objections thereto (docket entry # 19), and the Government's response to petitioner's objections (docket entry # 22), and the Court finding that:

(a) Mann filed a pro se petition for habeas relief on August, 8, 2015, over ten years after filing his first petition under the Post-Conviction Collateral Relief Act, 42 Pa.C.S. §§ 9541, et seq. ("PCRA");

(b) As detailed in Judge Hey's R & R, Mann timely filed his first PCRA petition on August 25, 2004, after 274 days of the one-year limitations period for any prospective habeas petition had run;<sup>1</sup>

(c) The Pennsylvania Supreme Court denied his final petition for allowance of appeal on November 4, 2009, meaning that, while his one-year period for filing a habeas petition was tolled between 2004 and 2009, see 28 U.S.C. § 2254(d)(2), petitioner needed to file his habeas petition by February 3, 2010 in order for it to be timely under AEDPA;

(d) Mann's petition, filed in August of 2015, is therefore untimely;

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<sup>1</sup> The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides this one year limitation. See 28 U.S.C. § 2254(d).

(e) Mann does not qualify for equitable tolling, as he has failed to show that he has pursuing his rights diligently as required by the Supreme Court in Holland v. Florida, 560 U.S. 631, 645-46 (2010);

(f) Moreover, Mann does not qualify for the Fundamental Miscarriage of Justice Exemption, as he has not made the requisite showing of actual innocence, see McQuiggin v. Perkins, 133 S. Ct. 1924 (May 28, 2013) (citing Schlup v. Delo, 513 U.S. 298, 324 (1995));

(g) Finally, Mann's argument, presented for the first time in his objections, that his claims were entitled to review under Martinez v. Ryan, 132 S. Ct. 1309 (2012), is erroneous since that case applied to situations where attorney error caused procedural default in initial-review collateral proceedings, and is thus inapplicable to cases, such as this one, where Mann has filed his petitions in state and federal court pro se;<sup>2</sup>

(h) Since Mann's untimely petition cannot be excused, we will adopt Judge Hey's R & R and dismiss his petition with prejudice.

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<sup>2</sup> Mann's only counsel in his post-conviction proceedings seemed to be Court appointed counsel in his first PCRA petition, which was dismissed without a hearing. See Commonwealth v. Mann, C.P. No. 9909-0478 (Phila. C.C.P. Mar. 21, 2006. This counsel was appointed after Mann had initiated his proceedings, and thus Martinez would not apply.

It is hereby ORDERED that:

1. Magistrate Elizabeth T. Hey's Report and Recommendation is APPROVED and ADOPTED;
2. Mann's petition for writ of habeas corpus is DISMISSED WITH PREJUDICE;
3. We DECLINE to issue a certificate of appealability;<sup>3</sup> and
4. The Clerk of Court shall CLOSE this case statistically.

BY THE COURT:

/s/ Stewart Dalzell, J.

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<sup>3</sup> A certificate of appealability should issue only when reasonable jurists could disagree with our ruling, see Slack v. McDaniel, 529 U.S. 473, 484 (2000), and that is not the case here.